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SUPERVISORY JUDICIAL CONTROL OF FEDERAL AND PROVINCIAL PUBLIC AUTHORITIES IN QUEBEC

By DENIS LEMIEUX*

The control of the legality of administrative action in Québec has given rise to many judicial decisions in recent years. Constitutional problems related to the procedural aspects of judicial review have also frequently originated in Québec. The inclusion of the old common law remedies, such as prerogative writs, in the *Code of Civil Procedure*¹ has modified those remedies in some respects. Particular statutes have provided other characteristics of the Québec law of judicial review. Since 1971 the existence of the Federal Court has further modified the picture.

The purpose of this paper is to examine judicial review in Québec, and to comment on the recent proposals for reform of judicial review put forward by the "Comité sur la révision judiciaire" in Québec, and by the Law Reform Commission of Canada in its Working Paper No. 18, "Federal Court—Judicial Review."²

I. THE LEGAL FOUNDATION OF JUDICIAL REVIEW IN QUEBEC

The present system of judicial review in Québec originated in the Treaty of Paris of 1763, by which France ceded to Great Britain the territory that is now the province of Québec. A consequence of that cession was the introduction in Québec of the public law of England, as part of the new political regime. The common law relating to the Crown and other public bodies was thus made part of Québec law (already a mixture of civil and common law).

A new system of courts, virtually modelled on the judicial structure utilized in England, was rapidly set up. The Court of King's Bench thus acquired original jurisdiction in many fields, including the power to grant prerogative writs and other remedies. In 1849 a reform of the court system in Québec (then Lower Canada) conferred to the Superior Court the original jurisdiction in civil matters that belonged to the Court of King's Bench, which was to become a Court of Appeal.³ From then on, the Superior Court became the depositary of the supervisory jurisdiction over public authorities in Québec.⁴

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¹ S.Q. 1965, c. 80.

² Law Reform Commission of Canada, *Federal Court: Judicial Review* (Ottawa: Minister of Supply & Services, 1976).

³ *An Act to amend the Laws relative to the Courts of Original Civil Jurisdiction in Lower-Canada*, 1849 S.C., c. 38.

⁴ For a good historical development, see *Three Rivers Boatman Ltd. v. CLRB*, [1969] S.C.R. 607 at 615-16, 12 D.L.R. (3d) 710 at 716-17. More generally, see Dus-sault, *Traité de droit administratif canadien et québécois* (Québec: Les Presses de l'université Laval, 1974) at 1105-12.

The *British North America Act, 1867*⁵ took into account the system of courts functioning in the colonies that were to become part of the new federation. Indeed, section 129 of the *B.N.A. Act* provided for the continuation of the existing courts, including, of course, the Superior Court. However, section 96 stated that, from then on, members of the provincial Superior Court should be appointed by the Governor General, and not by provincial authorities. This provision of the *B.N.A. Act* did not follow the concept of shared jurisdiction between federal and provincial authorities, and was to become a "sword of Damocles" over provincial court organization, especially in Québec.

Conversely, the administration of justice itself, "including the constitution, maintenance, and organization of provincial courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those courts," was conferred to the provinces by section 92(14) of the *B.N.A. Act*.

This general jurisdiction, however, was overshadowed by another provision of the *B.N.A. Act*, section 101, which stated that:

The Parliament of Canada may, notwithstanding anything in this Act, from time to time provide for the constitution, maintenance, and organization of a general court of appeal for Canada, and for the establishment of any additional courts for the better administration of the laws of Canada.

This provision left open the possibility of a parallel system of federal and provincial (including superior and appeal) courts.

Under section 101, the Federal Parliament created the Supreme Court of Canada, which was eventually to become the final court of appeal in Canada. Parliament also set up the Exchequer Court and gave it jurisdiction in various fields, such as admiralty law, federal taxation, actions arising from federal government contracts and torts, etc. The Court was later to acquire appellate jurisdiction for some federal administrative tribunals. The emergence of these tribunals in recent years and the relative importance of their decisions have made it more crucial to know with certainty which court has the power to supervise these new agencies.

Several decisions emanating from federal boards had been reviewed as a matter of course by the Québec courts, but the issue was not finally solved by the Supreme Court of Canada until 1969 in the *Three Rivers Boatman* case.⁶ In this case, a trade union representing some employees of Three Rivers Boatman Ltd. applied before the Labour Relations Board of Canada to be certified as bargaining agent for these employees. The employer contended at the hearing that the Board had no jurisdiction in the matter, since the works were under provincial jurisdiction. Accordingly, he requested that the Superior Court quash the proceedings by way of a writ of evocation (analogous to prohibition and *certiorari*). The union, however, argued that the Superior Court had no jurisdiction to grant such a writ against a federal tribunal, as article 33 of the Québec *Code of Civil Procedure* had only con-

⁵ 30 & 31 Vict., c. 3.

⁶ *Supra* note 4. A number of instances where federal boards' decisions were controlled by provincial courts are referred to at 617 (S.C.R.), 718 (D.L.R.).

ferred jurisdiction to the Court over "bodies politic and corporate within the Province." The Supreme Court decided unanimously that the Superior Court had inherent supervisory jurisdiction over federal as well as provincial authorities. It was held that no statutory mention of the power of judicial review was necessary and that only the Federal Parliament could affect that jurisdiction with regard to federal boards.

Less than two years later, the *Federal Court Act* was enacted.⁷ The new Court retained the functions of the Exchequer Court and was given additional jurisdiction. In particular, section 18 of the Act gave the Trial Division of the Court exclusive jurisdiction to grant relief in the nature of prohibition, *certiorari*, *mandamus*, *quo warranto* and declaration against federal authorities.⁸ The Federal Court, therefore, has a limited jurisdiction over federal agencies and departments operating in Québec, whereas the Superior Court is competent to supervise provincial authorities and has some residual powers in relation to federal authorities.

II. THE SUPERVISORY POWER OF THE SUPERIOR COURT

From its inception, the Superior Court has had an inherent jurisdiction over prerogative writs and other remedies, but its powers were modified by the *Code of Civil Procedure* and other statutes. A reform of the law of judicial remedies is being considered at this time. It aims at simplifying and unifying the existing remedies.

A. Origin of the Remedies

As we have seen, the common law of judicial remedies was introduced in Québec soon after the Treaty of Paris, and was not much affected by the first statutes and ordinances, which dealt primarily with the organization of the court system. Mention of *habeas corpus* and other prerogative writs was to be found in some statutes, but these remedies were still granted according to the conditions set forward by the common law.⁹

Not until the adoption of the second *Code of Civil Procedure* in 1897 (the first one was enacted in 1861 but was a consolidation of existing statutes) was there an attempt to codify the rules concerning the common law remedies.¹⁰ It is remarkable that this codification took place within a Code influenced by the French "Ordonnance sur la procédure civile, 1667," which was in force in Québec before 1763.¹¹

⁷ R.S.C. 1970 (2d Supp.), c. 10.

⁸ See Lemieux and Vallières, *Le fondement constitutionnel du pouvoir de contrôle judiciaire exercé par la Cour fédérale du Canada* (1975), 2 Dal. L.J. 268. The Québec courts have acknowledged their loss of jurisdiction to the Federal Court. See, for instance, *Lafleur v. Hillinger*, [1976] C.A. 377.

⁹ See *Hamilton v. Fraser*, [1811] Stu. K.B. 21, 1 R.J.R.Q. 115 (prohibition); and *R. v. Gingras*, [1833] Stu. K.B. 560, 1 R.J.R.Q. 413 (*certiorari*) for early illustrations of judicial review in Québec.

¹⁰ See LeDain, *The Supervisory Jurisdiction in Quebec* (1957), 35 Can. B. Rev. 788 at 791 ff.

¹¹ See *Bourdon v. Cité de Montréal* (1918), 54 C.S. 193, 24 R. de Jur. 543; and *Ethier v. DeLimbourg* (1918), 55 C.S. 179.

B. *Present Remedies*

Prerogative writs are part of the present *Code of Civil Procedure*, enacted in 1965. The Code also includes other private law remedies. The Québec courts have developed the direct action in nullity, while additional remedies are found in various statutes.

1. The Prerogative Writs

The *Code of Civil Procedure* represents an attempt to codify all existing law concerning the prerogative writs in civil matters. However, the common law is still used to interpret the provisions of the Code, and to supplement them if necessary.

a) *Evocation*

One of the changes introduced in the *Code of Civil Procedure* of 1965 was the unification of prohibition and *certiorari*, which eliminated many difficulties encountered in the past. The law had previously been uncertain as to the proper time to grant a writ of *certiorari*, as opposed to a writ of prohibition. This situation was well illustrated in the famous case of *L'Alliance des professeurs catholiques de Montréal v. LRB*,¹² where a writ of prohibition was claimed against an order of the Labour Relations Board. The Supreme Court engaged in a perilous exercise in semantics, and finally granted a declaration of nullity in favour of the claimant, but not the writ of prohibition itself. The writ of evocation has thus simplified the matter, since it covers the same ground as did the former writs of prohibition and *certiorari*.

In other respects, however, the courts have interpreted quite strictly article 846 of the Code, which defines evocation in the following terms:

The Superior Court may, at the demand of one of the parties, evoke before judgment a case pending before a court subject to its superintending and reforming power, or revise a judgment already rendered by such court

The conditions required for the obtention of a writ of evocation are:

- (1) The "court" must be a statutory board. This excludes boards such as arbitration boards created by contract or otherwise than by statute.¹³ (In this respect, evocation is more limited than *certiorari*.¹⁴); and
- (2) That body must act judicially, i.e.,
 - (a) the statute must provide for a hearing or other adversary-type proceedings, or
 - (b) the decision is likely to affect the rights of the claimant *and* the statute contains some indication that a quasi-judicial procedure was to be followed by the administrative authority involved.

The mere fact that a decision affects the rights of the claimant is not sufficient; this again is a departure from English law as established by *Ridge*

¹² [1953] 2 S.C.R. 140, [1953] 4 D.L.R. 161.

¹³ See *National Equestrian Fed'n of Can. v. Martin*, [1975] R.P. 146 (Qué. C.A.).

¹⁴ Compare with *R. v. Criminal Injuries Comp. Bd., Ex parte Lain*, [1967] 2 Q.B. 864.

v. *Baldwin*.¹⁵ The position now taken by the Court has been expressed clearly in *Saulnier v. Commission de police du Québec*.¹⁶ In a more recent case, Mr. Justice Pigeon reaffirmed that in the *Saulnier* case, "Judicial review was granted because, not only was there a duty to act judicially [in the *Police Act*] but the decision affected the rights of the applicant. At the risk of repetition I will stress that this does not mean that wherever the decision affects the rights of the applicant, there is a duty to act judicially."¹⁷

This approach is in accordance with the literal meaning of the words of article 846. However, it is a source of interminable problems as to the qualification of the administrative process. Does the allocation of permits or grants affect rights? Does an inquiry involve a duty to act judicially? The "right" answer to these questions was made more important by the fact that evocation had to be used instead of the direct action in nullity, as we will see later.

b) *Habeas Corpus*

Fortunately, the writ of *habeas corpus* does not present the same problem. Article 851 of the Code provides that:

Any person who is confined or otherwise restrained of his liberty, except under an order in civil matters granted by a court or a judge having jurisdiction, or for some criminal or supposed criminal matter, or any other person on his behalf, may apply to a judge of the Superior Court to obtain a writ of *habeas corpus* ordering the person under whose custody he is detained to bring him forthwith before a judge of the court and to show the cause of his detention, so that it may be decided whether such detention is justified.

The writ of *habeas corpus* would be available to a person who is detained against his will (and without proper authorization) in a hospital, an asylum or a welfare centre. It is used quite sparingly, and has given rise to few cases dealing with provincial authorities. Lack of legal counsel, or the fact that evocation has found relative success in the past in similar situations,¹⁸ probably explain this sparsity of cases. In civil—especially immigration—matters, however, *habeas corpus* is still used in relation to federal authorities, since it is not included in section 18 of the *Federal Court Act*.

c) *Mandamus*

Article 844 of the Code states that:

Any person interested may apply to the court to obtain an order commanding a person to perform a duty or an act which is not of a purely private nature

It is used to prohibit some act, or to force the exercise of a duty.

The conditions for the obtainment of the writ of *mandamus* are similar to those developed by the common law. However, a particular feature of Québec law is that *mandamus* may lie against private bodies, when these bodies have public duties. For instance, one may force a corporation to hold

¹⁵ [1964] A.C. 40, [1963] 2 All E.R. 66.

¹⁶ [1976] 1 S.C.R. 572, 57 D.L.R. (3d) 545.

¹⁷ *Martineau v. Matsqui Inst. Inmate Disciplinary Bd.*, [1978] 1 S.C.R. 118 at 133, 74 D.L.R. (3d) 1 at 12, 33 C.C.C. (2d) 366 at 377.

¹⁸ See, for instance, *Topalinsky v. Prévost*, [1968] C.S. 286.

an annual meeting of shareholders as stipulated by its articles or charter.¹⁹ Thus, *mandamus* in Québec has a wider scope than its English counterpart. Occasionally, it even supersedes the mandatory injunction, which also exists in Québec law.

The difficulty with *mandamus* lies mostly with the kind of relief that can be obtained through the use of the writ. It is certain that the nullity of a decision cannot be the main relief sought, but the claimant may, and sometimes should, apply for a declaration of nullity as subsidiary or incidental relief.²⁰ There are also contradictory decisions as to the availability of damages as a joint remedy with *mandamus*.²¹

d) *Quo Warranto*

While the writ of *quo warranto* has been abolished in England, and is rarely used in other common law jurisdictions, it still flourishes in Québec, where it is used against provincial and local officials, primarily to question the statutory qualification of elected municipal councillors. However, the *Municipal Bribery and Corruption Act*²² has provided for a new remedy with more severe penalties in situations where the writ of *quo warranto* had been used in the past.

One particular feature of *quo warranto* in Québec is that its application is not limited to public offices, but also extends to private offices, such as directorships of private corporations.²³ This is due to the language used in article 838 of the Code, which provides that:

When a person occupies or exercises illegally, either a public office or a franchise in the Province, or an office in a public or private corporation, a public body or board or a group of persons contemplated by article 60, any person interested may apply to the court for an order that he be ousted therefrom; he may even ask that a third party be declared to be entitled to such office or franchise, if he alleges the facts necessary to show that he is entitled to it.

As it stands, the writ of *quo warranto* is still helpful in Québec and does not present any serious difficulties. It is a popular remedy and is available to attack illegal nominations to public boards and to determine whether an elected official is eligible to keep his seat.

e) *The Residual Influence of the Common Law Prerogative Writs*

While the *Code of Civil Procedure* has attempted to replace the old prerogative writs, it may not have covered some aspects of the common law. In

¹⁹ See *Fleury v. Socquet*, [1973] C.A. 135. Compare with *Davies v. Gas Light & Coke Co.*, [1909] 1 Ch. 708, 78 L.J. Ch. 445; *R. v. Bank of England* (1819), 2 B. & Ald. 620, 106 E.R. 492; *R. v. London Assurance Co.* (1822), 5 B. & Ald. 899, 106 E.R. 1420; and *Holland v. Dickson* (1888), 37 Ch. D. 669, [1886-90] All E.R. Rep. Ext. 1549.

²⁰ *Hôpital Ste-Jeanne d'Arc v. Garneau*, [1959] B.R. 583, *aff'd* [1961] S.C.R. 426; *Intertrade Industries Ltd. v. Cité de Côte St-Luc*, [1965] C.S. 369.

²¹ Compare *Communauté Urbaine de Montréal v. Reggio Foods Inc.*, [1976] C.A. 465; and *Corporation de l'Hôpital Bellechasse v. Pilote*, [1975] 2 S.C.R. 454, 56 D.L.R. (3d) 702.

²² R.S.Q. 1964, c. 173.

²³ See *Ghimpelman v. Bercovici*, [1957] S.C.R. 128, 7 D.L.R. (2d) 193.

such a case, the Superior Court would be tempted to grant a common law writ under its inherent jurisdiction, as long as such a remedy is not specifically prohibited by law. This reasoning would be in line with article 20 of the Code:

Wherever this Code contains no provision for exercising any right, any proceeding may be adopted which is not inconsistent with this Code or with some other provisions of law.

The occasion to put such reasoning to the test arose recently in *Distributions Kinéma Ltée v. CCAQ*.²⁴ The defendant contended that the word "party" in article 846 did not include the claimant, who was only an intervenor before the administrative tribunal. The Court rejected this argument but added that, had it been true that the word "party" had such a restricted sense, the Court would have been ready to issue a writ of *certiorari*, even if the writ had disappeared from the Code.

In criminal matters, the Superior Court of criminal jurisdiction still relies on the common law to exercise its jurisdiction concerning prohibition, *certiorari*, *mandamus* and *habeas corpus*. This sphere of law is not covered by the Québec law of civil procedure, as it is not included in section 92(14) of the *B.N.A. Act*. The Canadian *Criminal Code*²⁵ has not provided for these remedies, except to state their existence.²⁶ The inherent power of the Court is exercised against inferior courts of criminal jurisdiction, but is not normally used against administrative authorities. We will see later how the *Federal Court Act* may have affected the supervisory jurisdiction of the Superior Court in criminal matters.

2. Private Law Remedies

The *Code of Civil Procedure* contains additional remedies that are widely used against provincial departments and agencies.

a) Injunction

This remedy has been widely used in the past in labour relations matters. More recently, it has also been used against Ministers in situations where *mandamus* might have been thought more appropriate. Article 751 of the Code defines the injunction as "an order of the Superior Court or of a judge thereof enjoining a person, his officers, agents or employees, not to do or to cease doing, or, in cases which admit of it, to perform a particular act or operation, under pain of all legal penalties." Injunction is a popular remedy, as it may be used in conjunction with other recourses. It may be interlocutory or permanent. There are few differences between a mandatory injunction and a writ of *mandamus*, and it is very difficult to tell one from the other where the duty of a person is not of a private nature.

b) Declaratory Judgment

This remedy was introduced for the first time in 1965 in the Code. Article 453 provides that "any person who has an interest in having deter-

²⁴ [1976] C.S. 1432, *aff'd* [1977] C.A. 308.

²⁵ R.S.C. 1970, c. C-34.

²⁶ See section 708 of the *Code*. For the origins of the prerogative writs in criminal law, see Létourneau, *L'historique des brevets de prérogative en droit anglais et canadien* (1975), 35 R. du B. 471.

mined immediately, for the solution of a genuine problem, either his status or any right, power or obligation which he may have under a contract, will or any other written instrument, statutes, order in council, or resolution or by-law of a municipal corporation, may, by motion of the court, ask for a declaratory judgment in that regard."

The Québec courts were quite reluctant to grant a declaratory judgment and, over the years, they developed a restrictive interpretation of article 453. They refused, for instance, to consider cases where the declaration might have a curative, instead of preventive, effect. The Supreme Court strongly disapproved of this attitude in the recent case of *Duquet v. Ste-Agathe-des-Monts*,²⁷ and gave article 453 a broad interpretation, in conformity with article 20. Since *Duquet*, the declaratory judgment has become almost as wide in scope as the common law declaration. The case may thus have helped to solve a delicate problem of Québec law—the absence of the declaratory action itself in the Code.

It seemed, at one time, that the declaratory action had no legal foundation in Québec, and there were some *dicta* of the Supreme Court to that effect.²⁸ However, declaratory relief had been granted by the Supreme Court itself in the *Alliance* case.²⁹ In 1976 Chief Justice Deschênes of the Québec Superior Court indicated that the declaratory action was available to a plaintiff to attack the constitutionality of a Québec statute.³⁰ It appears, therefore, that the declaratory action is available in Québec, but, wherever possible, a plaintiff should use the procedure set by article 453, as interpreted in the *Duquet* case.

c) *Homologation*

Homologation is not, in itself, a judicial remedy. It is a procedure designed to make an administrative decision executory against a party, in the same way as a judgment of a court. This concept is drawn from French civil procedure and appears to have no counterpart in common law jurisdictions.

The interesting thing about homologation is that it also provides for some degree of judicial review of the decision submitted. Article 950 of the Code reflects the dual—part administrative and part judicial—character of the procedure of homologation:

The award of arbitrators can only be executed under the authority of a court having jurisdiction, and upon motion for homologation, to have the party condemned to execute it.

The court before which such suit is brought may examine into any grounds of nullity which affect the award or into any other questions of form which may prevent its being homologated; it cannot, however, enquire into the merits of the contestation.

²⁷ [1977] 2 S.C.R. 1132.

²⁸ *Saumur v. A.G. Qué.*, [1964] S.C.R. 252, 45 D.L.R. (2d) 627; *Jones v. Gamache*, [1969] S.C.R. 119, 7 D.L.R. (3d) 316.

²⁹ *Supra* note 12.

³⁰ *Bureau Métropolitain des Ecoles Protestantes de Montréal v. Ministre de l'Éducation du Québec*, [1976] C.S. 358. The Court of Appeal refused to consider an appeal from that judgment, as the repeal of that statute had made the problem purely academic.

Homologation may thus become the normal procedure used to contest the legality of a decision, especially where there is no appeal or evocation to the Superior Court.³¹

Homologation is not, however, confined to the *Code of Civil Procedure*; it is included in various statutes. Jurisdiction to homologate is given not only to the Superior Court, but sometimes to the Provincial Court as well; this may cause some constitutional problems, as the Provincial Court is an inferior court having no supervisory jurisdiction.³²

In some cases, the courts have considered homologation as a mere administrative formality and have refused to examine the legality of the decision. In other cases, the courts have shown themselves eager to use homologation as a normal form of judicial review.³³ It is not easy to reconcile these two trends. However, we may observe from the cases on homologation that, where there is a statutory right of appeal or another recourse provided by law, a court will not readily use homologation as an opportunity to review a decision. The court will suggest, instead, that the injured party attack the homologated decision in the normal way.³⁴ The situation might be different where there is no right of appeal and a privative clause prevents the injured party from using the extraordinary remedies of evocation, *mandamus* and the like, unless there is a strict jurisdictional question. In this case, the court might review the decision, even if the law does not specify that it has the power to do so, and does not indicate grounds for refusal of homologation.³⁵

3. The Curious Case of the Direct Action in Nullity

Article 33 of the Code gives the Superior Court original jurisdiction in matters of judicial review in Québec. It states that:

Excepting the Court of Appeal, the courts within the jurisdiction of the Legislature of Quebec, and bodies politic and corporate within the province are subject to the superintending and reforming power of the Superior Court in such manner and form as by law provided, save in matters declared by law to be of the exclusive competency of such courts or of any one of the latter, and save in cases where the jurisdiction resulting from this article is excluded by some provision of a general or special law.

³¹ See *Bédard v. Trudel*, [1975] R.P. 290 (C.S.).

³² Nevertheless, the Provincial Court has on several occasions refused to homologate illegal decisions, which amounts in practice to a declaration of nullity. See *Massé v. Breuvages Lucky One Ltée*, [1972] R.D.T. 10; and *Corporation des maîtres mécaniciens en tuyauterie du Qué. v. Gabriel Dubreuil*, [1974] R.L. 496.

³³ See the distinction in *Ville de Montréal v. Succession Charles Chaffer*, [1975] C.S. 739. See, for instances of judicial review, *Ville de Baie-Comeau v. Lévesque*, [1974] C.A. 51; and *Gagnon Electric Ltée v. Fraternité inter-provinciale des ouvriers en électricité, local 568*, [1975] C.S. 283. This form of judicial control is not recent: *Cité de Montréal v. Childs* (1889), 18 R.L. 268 (Qué. S.C.). Also see *Société Centrale d'Hypothèques et de Logement v. Jobin*, [1977] C.P. 148; and *Clément v. Ville d'Acton Vale*, [1976] R.P. 92.

³⁴ See *Ville de Drummondville v. Madore et Fils Inc.*, [1974] R.P. 378 (C.S.); *D'Amours v. Côté*, [1966] R.P. 423 (C.P.); and *Télé câble de Qué. Inc. v. Bell Canada*, [1975] C.S. 1118.

³⁵ *La Commission des Accidents du Travail de Qué. v. Paul Service Stores Ltd.*, [1961] B.R. 869; *La Commission des Accidents du Travail de Qué. v. Forbes Dubé Lumber*, [1958] B.R. 573; *Procureur Général de Qué. v. Slanec* (1933), 54 B.R. 230, [1933] 2 D.L.R. 289, *rev'g* (1932), 70 C.S. 274, [1932] 3 D.L.R. 81.

Amazingly enough, the Québec courts have drawn from this statutory foundation a new remedy having no counterpart in the common law—the direct action in nullity. It differs from *certiorari* in that it is not a discretionary remedy, and differs from the common law declaration in that its effect is to quash a decision instead of declaring its nullity. Any interested person may introduce an action in nullity within a thirty-year period. However, a decision will be annulled only for want or excess of jurisdiction or for some other grave illegality. A direct action in nullity will not usually be allowed when another remedy is available. For instance, the Court of Appeal has held repeatedly that a person cannot use it in a situation where the conditions for evocation are satisfied.³⁶ The logic behind this attitude is to be found in the words of article 31, “in such manner and form as by law provided,” which have been interpreted to mean that the direct action in nullity is the final—not an alternative—recourse.

Thus, the direct action in nullity remains a common law remedy developed within the framework of a French-inspired Code of Civil Procedure, to be used when the Code and the relevant statutes do not provide any other effective recourse.³⁷ It remains to be seen whether the Supreme Court will take such a restricted view of the scope of the direct action in nullity, especially after the stand it has taken in the *Duquet* case.³⁸

4. Other Statutory Remedies

Several Québec statutes include a right of appeal to the Appeal, Superior or Provincial Court from the decisions of various provincial agencies. This right of appeal is often limited to questions of law and jurisdiction, and is barely distinguishable from evocation. However, article 846 states that where a right of appeal is conferred by law, no writ of evocation can be granted unless there is a clear case of want or excess of jurisdiction. Sometimes, the courts have even extended the word “appeal” to include administrative appeal, even where the appeal is completely useless due to the nature of the alleged illegality.³⁹

³⁶ *Cité de Trois-Rivières v. Brière*, [1974] C.A. 82; *Séminaire St-François de Cap-Rouge v. Yaccarini*, [1973] C.A. 713. The same reasoning had been expressed in relation to a statutory remedy (the motion to quash) in *Shannon Realities Ltd. v. Ville de St. Michel*, [1924] A.C. 185, [1924] 1 D.L.R. 119 (P.C.). Also see *Société Radio-Canada v. Union des artistes*, unreported, May 13, 1978 (Qué. C.A.) for the proposition that homologation under article 950 of the *Code of Civil Procedure* precludes the use of the direct action in nullity. However, the Supreme Court of Canada has just decided that the direct action in nullity was available as an alternative remedy to the writ of evocation. See *Richard v. P.G. du Qué.*, December 12, 1978, as yet unreported.

³⁷ See LeDain, *supra* note 10, at 794: The specific terms of article 33 “have frequently been invoked by the courts to justify particular exercises of the supervisory jurisdiction which they might have had greater difficulty in justifying if the provision had not existed.” While one may wonder at the somewhat specious foundation of the direct action in nullity, “it is a little late in the day now to question the antecedents of a recourse that has behind it a jurisprudence of almost one hundred years.” (at 800).

³⁸ *Supra* note 27. Doubts have been expressed as to the relevance of the Court of Appeal’s position in *Robinson v. Commission de Police du Qué.*, [1977] C.S. 335. These doubts were well founded. See note 36, *supra*.

³⁹ *Morin v. RAMQ*, unreported, March 4, 1976 (Qué. S.C.).

In municipal law, the *Cities and Towns Act*,⁴⁰ the *Municipal Code* and some city charters (enacted as private acts) contain a special remedy—the petition to quash. For instance, section 411 of the *Cities and Towns Act* provides that:

Any municipal elector may, by petition presented in his name, apply and obtain on the ground of illegality, the quashing of any by-law or part of by-law of the council, with costs against the municipality

Such an action may be instituted by any municipal elector within a three-month period. After that time, only an interested person—that is, one who is specially affected by the by-law—may attack it by taking a direct action in nullity, but he will have to allege serious grounds of illegality, whereas mere procedural irregularities may render a by-law void by means of the action to quash.

Statutory provisions stipulated that actions to quash had to be introduced before the Provincial Court. For constitutional reasons, the Superior Court now has *de facto* jurisdiction over such actions.⁴¹ As a result, the action to quash, which used to constitute a speedy remedy due to the lighter load of cases in the Provincial Court, is now less expeditious.

This completes the arsenal of judicial remedies available before the Superior Court to attack the validity of an administrative decision.⁴² The complexity of these recourses and the uncertainty regarding their use led the Québec government to set up a “Comité sur la révision judiciaire” in 1976. This Committee presented its report to the Department of Justice in December, 1976. However, it was not until very recently that the report was publicized and used as a basis for forthcoming legislation.

C. *Proposals of the “Comité sur la révision judiciaire”*

The mandate of the Committee was to unify the prerogative writs and other remedies “prévus au Code de procédure civile et dans les lois spéciales” dealing with control over the legality of administrative decisions. Accordingly, the Committee has suggested the adoption of a new “recours en surveillance judiciaire,” and has recommended a simplified procedure for applications to review. We will concentrate on the main aspects of the proposed remedy.

The Committee’s main recommendation is that a new “recours en surveillance judiciaire” be set up as the only remedy in the Code to be used in reviewing the legality of a decision emanating from a public authority. It will provide different kinds of relief, such as an order to act or a prohibition to act, the annulment of a decision or the granting of a declaration.

The grounds of illegality which can be alleged by a claimant are enumerated in an exhaustive list that purports to codify the existing grounds for

⁴⁰ R.S.Q. 1964, c. 193.

⁴¹ *Courcy v. Ville de Longueuil*, [1976] C.S. 867; *Langelier v. Corporation Mun. de St-François de Pabos*, [1976] C.S. 1284. The constitutional problem will be explained later.

⁴² Also see Dussault, *supra* note 4, at 983-1217.

review. While the list is limitative, it contains headings such as "violation de la loi de nature à entraîner une injustice flagrante," which *may* include some grounds of illegality that are not otherwise mentioned in the enumeration (for instance, the lack of evidence to support a decision affecting rights, and the duty to act fairly). The proposed remedy would be used within a reasonable time and after the claimant had exhausted any "useful" right of appeal or reconsideration that might be available to him. It would replace entirely the writs of evocation and *mandamus*, as well as the direct action in nullity. It would also assume some aspects of injunction and the declaratory judgment, but would leave *quo warranto* intact. The writ of *habeas corpus* would remain, but problems of legality arising out of *habeas corpus* proceedings would be adjudicated under the new recourse.

To determine whether a decision or process is reviewable under the new remedy, the courts would have to use the "public vs. private" test. Thus, proceedings of a private nature would still be reviewable under the present law of remedies. Administrative adjudication by public authorities and delegated legislation would be reviewed only by way of the new "recours en surveillance judiciaire." One might argue that the "public vs. private" test is not ideal and might create the same sort of difficulties that the courts have brought up with article 846, that is, the "quasi-judicial vs. administrative" test. It is true that some provisions of the Code, especially article 844 (*mandamus*), already refer to such a distinction, but the case law under article 844 is rather unclear.

The word "decision" is not really defined in the Committee's draft bill. It is said that: "Le terme 'décision' désigne également un statut, un arrêté en conseil, un règlement ou une résolution."

In practice, then, the scope of the new remedy is left entirely to the discretion of the courts. The use of a formula such as "exercise, refusal to exercise or proposed or purported exercise by any person of a statutory power or prerogative" may have been more helpful.

The effect of the proposed recourse on existing judicial remedies is not clear. To what extent will they be repealed or modified? What will happen to the other common law and statutory remedies (homologation, declaration, appeal, petition to quash in municipal law, etc.) not directly affected by the reform?

It seems that the propositions set forward by the Committee in its Draft Bill, while settling old problems, will create new ones. More research on the existing remedies and a more global view of the law of judicial review would have been expected from the Committee, but its mandate was limited and the Committee itself chose to interpret it very restrictively.

D. *Some Restrictions on Judicial Review*

The tendency of Québec legislation, especially in the last thirty years or so, has been to deprive, or attempt to deprive, the Superior Court of part of its supervisory jurisdiction. This was done by setting up privative clauses or by transferring aspects of supervisory jurisdiction to inferior tribunals.

1. Negative Restrictions: Privative Clauses

Québec statutes conferring discretionary powers almost invariably include privative clauses, their purpose being to ensure the finality of administrative adjudication.⁴³ The standard privative clause will state that "no extraordinary recourse contemplated in articles 834 to 850 of the *Code of Civil Procedure* shall be exercised and no injunction granted against the persons . . . acting in their official capacities."

The reaction of the courts in Québec,⁴⁴ and of the Supreme Court of Canada,⁴⁵ has been to consider that these clauses did not prohibit judicial review but only restricted it to jurisdictional questions. However, "jurisdiction" is a bird of many colours and the courts may, in their discretion, include as affecting jurisdiction various types of errors of law, as well as violations of the rules of natural justice. The Québec courts have had the same attitude towards clauses that prescribe a particular remedy but set a short time limit for its exercise. Such provisions have been considered inoperative in cases of excess of jurisdiction.⁴⁶

The reaction of the Québec courts generally has been to interpret quite liberally their supervisory jurisdiction in situations where they wished to intervene. Consequently, the use of the privative clause is of no great importance today, except for the problems of errors within or affecting jurisdiction and lack of evidence. The "Comité sur la révision judiciaire" has proposed that the new "recours en révision judiciaire" be exercised notwithstanding these clauses.⁴⁷

2. Positive Restrictions: Inferior Tribunals with Supervisory Jurisdiction

Over the years, the jurisdiction of the Provincial Court (formerly the Magistrate's Court) was enlarged to include some aspects of municipal affairs. More recently, the Court has been used as a tribunal for appeals from the decisions of several government agencies.

⁴³ See Dussault, *supra* note 4, at 1147-68 for a "tour d'horizon" on privative clauses in Québec.

⁴⁴ *Lalonde Automobile Ltée v. Naylor*, [1974] C.A. 489, [1974] R.P. 372; *Soccio v. Régie des Alcools du Qué.*, [1972] C.A. 283; *Ass'n Catholique des Enseignants de l'Estrie v. Commission des Ecoles Catholiques de Sherbrooke*, [1970] C.A. 369.

⁴⁵ *L'Alliance des professeurs catholiques de Montréal v. LRB*, *supra* note 12; *Commission des Relations de Travail du Qué. v. Cimon Ltée*, [1971] S.C.R. 981.

⁴⁶ *Club de courses Jacques-Cartier Inc. v. Cossette*, [1975] C.S. 912; *Jolicoeur v. Cité de Québec*, [1974] C.A. 293. Compare with *Smith v. East Elloe Rural Dist. Council*, [1956] A.C. 736.

⁴⁷ The *Charter of Human Rights and Freedoms*, S.Q. 1975, c. 6, might affect future privative clauses, as far as natural justice is concerned. Section 23 of the *Charter* states that:

Every person has a right to a full and equal, public and fair hearing by an independent and impartial tribunal, for the determination of his rights and obligations or of the merits of any charge brought against him.

The word "tribunal" is said to include an "inquiry commission" (section 56(1)). By section 52, section 23 is made to "prevail over any provision of any subsequent act which may be inconsistent therewith unless such act expressly states that it applies despite the Charter."

In 1964 the Supreme Court held that the Provincial Court itself was constitutional, even if its jurisdiction in civil matters had been enlarged to include actions of up to \$3,000. But the Supreme Court did not, however, rule on other spheres of competence of the Provincial Court.⁴⁸

In 1972 the well-known case of *Séminaire de Chicoutimi v. Cité de Chicoutimi*⁴⁹ decided that it was *ultra vires* the powers of the Québec legislature to give the Provincial Court jurisdiction over actions to quash municipal by-laws, as such jurisdiction belonged to a superior court in 1867. The case set up a chain reaction and, since then, some jurisdictions of the Court—in *quo warranto* proceedings involving local officials, for instance—were returned *de facto*, if not *de jure*, to the Superior Court.⁵⁰

The attempt of the Québec legislature to set up a parallel supervisory jurisdiction by using the Provincial Court (the members of which are nominated and paid by the Québec government) was thus foiled. There remains the appellate side of the Provincial Court's jurisdiction. Uncertainty still remains as to whether a provision creating an appeal on questions of law, while prohibiting other remedies, is *ultra vires*.

Another trend of Québec legislation in recent years has been towards the creation of administrative appeal tribunals, which have been set up to hear appeals on questions of law and fact from decisions of administrative agencies. For instance, the Professions Tribunal was created to supervise the various Disciplinary Councils set up under the *Professional Code*.⁵¹ The Municipal Commission supervises decisions made by the Director of Environmental Protection, while the Social Affairs Commission is a large tribunal that hears appeals from decisions by more than half a dozen agencies, such as the Automobile Insurance Board, the Rents Tribunal and the Workmen's Compensation Board. There have been suggestions as to the creation of an Administration Court to serve as a court of final appeal for administrative boards, but the existence of section 96 of the *B.N.A. Act* prevents the creation of such a Court.

Meanwhile, the constitutionality of the appeal tribunal scheme is being put to the test. It is admitted that the jurisdiction of these tribunals included matters that were left to private initiative in 1867 and therefore were not part of the Superior Court's jurisdiction, but is the appeal jurisdiction itself not analogous to the traditional supervisory jurisdiction of the Superior Court?

This test was applied in the recent Supreme Court case of *Attorney General of Québec v. Farrah*.⁵² The Transport Tribunal was created in 1972.⁵³ Its main jurisdiction is to hear appeals from the Transport Commission re-

⁴⁸ *Renvoi touchant la constitutionnalité de la loi concernant la juridiction de la cour de magistrat*, [1965] S.C.R. 772.

⁴⁹ [1973] S.C.R. 681, 27 D.L.R. (3d) 356.

⁵⁰ *Parker v. Betnesky*, [1976] C.P. 279.

⁵¹ S.Q. 1973, c. 43.

⁵² [1978] 2 S.C.R. 638, 86 D.L.R. (3d) 161.

⁵³ *Transport Act*, S.Q. 1972, c. 55, s. 52.

garding rates and licences. Section 58 of the Act refers to the appellate jurisdiction as follows:

The Transport Tribunal shall also have jurisdiction, to the exclusion of any other court, to hear and dispose of:

- a) in appeal, on any question of law, any decision of the Commission which terminates a matter;
- b) in appeal, decisions of the Commission under section 30;
- c) any matter, by evocation, when the Commission has omitted or neglected to render its decisions within six months following the making of the application.

Only paragraph (a) of section 58 was attacked for unconstitutionality.

The Court began its reasoning by admitting that it was open to a province "to establish an administrative tribunal of appeal as part of a valid regulatory statute and to invest such a tribunal with power to make decisions on questions of law in the course of exercising an appellate authority over decisions of the primary agency."⁵⁴ The Supreme Court also admitted that "a provincial legislature is therefore competent to reduce the scope of the supervisory power of a superior court by precluding the review by that court of the decisions of an inferior tribunal which, while taken within jurisdiction are, however, tainted with "illegality" (i.e., error of law on the face of the record), and might otherwise be quashed on *certiorari*."⁵⁵ Chief Justice Laskin went even further than Mr. Justice Pratte, who wrote the majority opinion. According to him, "the case law supports an even wider authority in this respect, authority to vest unreviewable power to determine all questions of law which arise in the course of the exercise of the provincial tribunal's statutory functions."⁵⁶

However, the Court read section 58(a) together with the privative clauses contained in other sections of the Act. The Court was unanimous in finding that the exclusionary character of section 58(a) was more than a standard privative clause. It was an attempt "to constitute the Transport Tribunal as the final court of appeal of Québec in matters within s. 58(a), and to oust the superintending and reforming authority of the Superior Court."⁵⁷ It was thus held unanimously by the Court that section 58(a) was *ultra vires*; consequently, the law established in the *Séminaire de Chicoutimi* case was extended to include some appeal functions as well. The Court did not, however, consider the fact that the Transport Tribunal had the power either to modify decisions of the Transport Commission, or to put them aside and substitute its own decisions. These powers are not tantamount to judicial review. Nevertheless, the mere fact that the Board had exclusive appellate jurisdiction was enough for the Court.

⁵⁴ *A. G. Qué. v. Farrah*, *supra* note 52, at 642 (S.C.R.), 164 (D.L.R.) *per* Laskin C.J.C.

⁵⁵ *Id.* at 655 (S.C.R.), 178 (D.L.R.) *per* Pratte J.

⁵⁶ *Id.* at 643 (S.C.R.), 165 (D.L.R.).

⁵⁷ *Id.* at 647 (S.C.R.), 168 (D.L.R.) *per* Laskin C.J.C. The Court refused to interpret section 58(a) as just another privative clause. Mr. Justice Pigeon, who wrote a separate opinion, but was in agreement with Mr. Justice Pratte, said on this point at 657 (S.C.R.), 169 (D.L.R.): "I see no reason to depart from the literal meaning of this legislation, which is perfectly clear."

The *Farrah* case is not the only instance where an appeal tribunal has been found to be *ultra vires*. However, other cases will soon come up before the Court of Appeal, and only then will the real impact of this decision on analogous statutory schemes be felt.⁵⁸ Under the present constitutional arrangement, there will always be a measure of uncertainty as to the legality of administrative appeal tribunals. It is only at the Superior Court level that one can seriously consider the creation of an administrative court, or, at least, of an administrative division of the Superior Court.

3. Is a Total Exclusion of the Superior Court's Supervisory Jurisdiction Possible?

We have seen that the courts have repeatedly ignored privative clauses to exercise their supervisory jurisdiction over inferior tribunals. Attempts to create provincially controlled supervisory tribunals have also failed, due to section 96 of the *B.N.A. Act*. What would happen, though, if a provincial legislature did adopt a total privative clause, excluding all forms of judicial control?

In *Three Rivers Boatman*, the Supreme Court held that a province could not usurp the Superior Court's jurisdiction over federal bodies, as this would amount to interference with federal jurisdiction.⁵⁹ Since the creation of the Federal Court, such power has been, but for minor exceptions, transferred to the new Court. Would a province have jurisdiction to preclude judicial review of the decisions of its own departments and boards, however? Until recently, such a question would have been considered purely theoretical. It is true that in *R. ex rel. Sewell v. Morrell*,⁶⁰ the Ontario High Court had stated that it could not review a decision from a War Mobilization Board, as the decisions of such boards (created under War Measures Act Regulation) were deemed to be legal even in cases of "want or excess of jurisdiction,"⁶¹ but this was a "war case" and could be dismissed as such. The accepted theory was more attuned to the famous dictum of Chief Justice Rinfret in the *Alliance* case, where he had written:

Le législateur, même s'il le voulait, ne pourrait déclarer l'absurdité qu'un tribunal qui agit sans juridiction peut être immunisé contre l'application du bref de prohi-

⁵⁸ The Municipal Commission was held to be *ultra vires* when it heard an appeal from the dismissal of a municipal manager in *Lévis v. Ouellet*, not yet reported, February 13, 1978 (Qué. C.S.). Also see two contradictory judgments concerning the Professional Tribunals: *Choquette v. Comité de discipline du Barreau*, not yet reported, December 15, 1977 (Qué. C.S.); and *Crevier v. Aubry*, [1977] C.S. 324.

⁵⁹ The Federal Parliament may, of course, affect that jurisdiction. See *Pringle v. Fraser*, [1972] S.C.R. 821, 26 D.L.R. (3d) 28.

⁶⁰ [1944] 3 D.L.R. 710 (Ont. H.C.).

⁶¹ Section 9(5) of the National Selective Service Mobilization Regulations, C.W.O.R./42-10924, reads as follows:

No proceeding authorized or pending before a Board and no decision of a Board shall, by means of an injunction, prohibition, *mandamus*, *certiorari*, *habeas corpus* or other process, issuing out of court, be enjoined, restrained, stayed, removed or subjected to review or consideration on any ground whether arising out of alleged absence of jurisdiction in a Board, nullity, defect or irregularity of the proceedings or any other cause whatsoever, nor shall any such proceedings or decision be questioned, reviewed or reconsidered in any court.

bition. Sa décision est nulle et aucun texte d'un statut ne peut lui donner de la validité ou décider que, malgré sa nullité, cette décision devrait quand même être reconnue comme valide et être exécutoire.⁶²

The problem with such high-sounding words is that they have no solid constitutional foundation. There is no enshrinement of judicial review in the *B.N.A. Act*. Instead, we have imported from the English public law the principle of parliamentary sovereignty which, in Canada, is limited only by the sharing of jurisdictions between federal and provincial parliaments. In England, administrative action may be made immune to judicial review.⁶³

This approach surfaced in Canada with the *Woodward* case.⁶⁴ The late Mr. Woodward had, by his will, left all the residue of his estate to the "Woodward Foundation." The foundation was created for charitable objects only. However, the Minister of Finance of British Columbia imposed a heavy succession duty on the estate. The assessment was made without notice to the executors, who applied for a writ of *certiorari*, alleging a violation of natural justice.

The *Succession Duty Act*⁶⁵ of British Columbia provided that the Minister could determine, in his absolute discretion, "whether any purpose or organization is a religious, charitable or educational purpose or organization."⁶⁶ The Act also contained a right of appeal to the Minister.⁶⁷ In this case, an appeal was made to the Minister, who refused to consider it.

To counter the allegation of the plaintiff, the Minister relied on an amendment to the *Succession Duty Act*. The purpose of the amendment was to ensure that the Minister's determination as to the status of a "purpose or an organization" was unreviewable:

[T]he determination of the Minister is final, conclusive and binding on all persons and . . . is not open to appeal, question or review in any Court, and any determination of the Minister made under this subsection is hereby ratified and confirmed and is binding on all persons.⁶⁸

The modifying Act came into force on the first day of April, 1970. However, it contained very peculiar provisions as to the amendment itself. First, the amendment ratifying the Minister's determination was not applicable in respect of estates in which the death of the deceased had occurred after the first day of April, 1970, but was "deemed to have come into force on the first day of April, 1968, and is retroactive to the extent necessary to give full force and effect to the provision it amends on or after that date, and applies

⁶² *Supra* note 12, at 155 (S.C.R.), 175 (D.L.R.).

⁶³ See Lemieux and Vallières, *supra* note 8. Also see Hogg, *Is Judicial Review of Administrative Action Guaranteed by the B.N.A. Act?* (1976), 54 Can. B. Rev. 716; *Farrel v. Workmen's Comp. Bd.*, [1962] S.C.R. 48 at 52, 31 D.L.R. (2d) 177 at 180-81 per Judson J.; and Dussault, *supra* note 4, at 1137-47.

⁶⁴ *Woodward v. Minister of Fin.*, [1973] S.C.R. 120, 27 D.L.R. (3d) 608, [1972] C.T.C. 385.

⁶⁵ R.S.B.C. 1960, c. 372, as am. by S.B.C. 1963, c. 44, and by S.B.C. 1970, c. 45.

⁶⁶ R.S.B.C. 1960, c. 372, s. 5(2), as am. by S.B.C. 1963, c. 44, s. 5.

⁶⁷ R.S.B.C. 1960, c. 372, s. 43, as am. by S.B.C. 1963, c. 44, s. 22.

⁶⁸ R.S.B.C. 1960, c. 372, s. 5(2), as am. by S.B.C. 1970, c. 45, s. 5.

to property passing on the death of a person dying on, from, and after that date."⁶⁹ This meant that:

- (a) all the decisions of the Minister already made in relation to successions where the death of the deceased had occurred between April 1, 1968 and April 1, 1970 were ratified retroactively; and
- (b) decisions that had not yet been made by the Minister with regard to such estates were also ratified *in advance*.

Retroactive legislation is not new. A parliament may adopt retroactive measures and, indeed, there have been many instances where provisions have been enacted so as to correct flagrant administrative illegalities. To extend that protection to administrative decisions yet to be taken, however, is an altogether different matter, and the impact on respect for the rule of law and for judicial review is of great magnitude.

The Supreme Court of Canada had to interpret the amendment and evaluate whether the decision concerning the Woodward Estate, to which the amendment applied, was still reviewable for excess of jurisdiction. Mr. Justice Martland, who wrote the unanimous judgment of the Court, held that the decision was indeed illegal, as it contravened the *audi alteram partem* rule. He went on to state that this constituted an excess of jurisdiction and that no privative clause could prevent the decision from being reviewed by the court.⁷⁰ However, he held that, in this case, the amendment had prohibited any intervention by the courts:

In my opinion the Legislature intended to ratify, confirm and make binding any determination of the Minister, under s. 5(2), which, otherwise, would have been invalid.

It is not the function of this Court to consider the policy of legislation validly enacted. Such legislation must be enforced in accordance with its terms.⁷¹

Some contrary views had been expressed by the Supreme and Appeal Court of British Columbia. Mr. Justice Monroe of the B.C. Supreme Court had held that:

[T]he Legislature could not ratify or confirm a determination that was not then in existence any more than it could ratify, confirm or make binding a determination which was a nullity at law. A determination made, as this one was, in breach of the principles of natural justice, is void.⁷²

The British Columbia Court of Appeal reversed Mr. Justice Monroe's judgment two to one. The majority opinion was affirmed by the Supreme Court. However, the dissenting member found it "difficult to accept the fact that the Legislature confided a statutory authority to the Minister subject to the use of his discretion, which could only be exercised judicially and which had to conform with the tenets of natural justice, and then by another clause give retroactive validity to a purported determination made in disregard of or in violation of the principles of natural justice and arbitrarily, and otherwise

⁶⁹ S.B.C. 1970, c. 45, s. 12.

⁷⁰ *Supra* note 64, at 128-29 (S.C.R.), 615-16 (D.L.R.), 389-90 (C.T.C.).

⁷¹ *Id.* at 130 (S.C.R.), 616-17 (D.L.R.), 390 (C.T.C.).

⁷² *Re Woodward Estate* (1970), 17 D.L.R. (3d) 583 at 589, [1970] C.T.C. 444 at 450 (B.C.S.C.).

protect that illegal decision from the supervisory area of a superior court by making it final, binding and conclusive on everybody and through the medium of a privative clause."⁷³ Mr. Justice Branca suspected that the amendment was an *ad hominem* clause "couched in its language to rescue the determination of the Minister made on May 1, 1969."⁷⁴

The appellant, the Woodward Estate, had relied heavily on the *Anisminic* case, in which the House of Lords had held that a "decision" made in violation of the rules of natural justice was no decision at all and could be reviewed, despite a clause that said that: "The determination by the Commission of any application made to them under this Act shall not be called in question in any court of law."⁷⁵ The Supreme Court, however, chose not to give such a "liberal" interpretation to the amendment. It held that such an interpretation "would deprive the latter words of section 5(2) of any effect whatever. It would mean that the ratification provision could only apply to a determination made within the Minister's jurisdiction and after observing the rules of natural justice. But such a determination requires no ratification or confirmation."⁷⁶

The appellant also argued that if the superior courts were precluded from reviewing the Minister's determinations under section 5(2), then the Minister would be acting *ultra vires*, as he would fulfil a function similar to that of a Superior Court under section 96 of the *B.N.A. Act*. The Supreme Court rejected this argument without any comment whatsoever and, by so doing, eliminated the last obstacle in the path of a statutory scheme aimed at the eradication of judicial review.⁷⁷

The *Woodward Estate* case goes a long way towards ensuring that parliamentary sovereignty supersedes judicial review. In a federal state such as Canada, the only restriction on unimpaired parliamentary sovereignty must be found in the *B.N.A. Act* itself; thus, the control of the constitutionality of a provincial statute could not be affected by a provision similar to section 5(2) of the *Succession Duty Act* of British Columbia, as this would allow a province to adopt *ultra vires* legislation without being checked judicially. Non-intervention by the courts in such situations would constitute a step towards the break-up of the federation, and there are indications that the Supreme Court would, in fact, intervene.⁷⁸

⁷³ *Minister of Fin. v. Woodward* (1971), 21 D.L.R. (3d) 681 at 722, [1971] C.T.C. 341 at 382 *per* Branca J.A.

⁷⁴ *Id.* at 730 (D.L.R.), 390 (C.T.C.).

⁷⁵ *Anisminic Ltd. v. Foreign Comp. Comm'n*, [1969] 2 A.C. 147, [1969] 2 All E.R. 208.

⁷⁶ *Supra* note 64, at 129-30 (S.C.R.), 616 (D.L.R.), 390 (C.T.C.).

⁷⁷ The argument was quite plausible and should have been answered by the Court. See *Re Schepull and Bekeschus*, [1954] O.R. 67, [1954] 2 D.L.R. 5 (H.C.), where an Ontario statute was held *ultra vires* in part because it conferred on a Minister a superior court function. For a discussion about the impact of the *Woodward* case, see P  pin, *Droit Administratif*, [1974] R. du B. 90 and 532. For a contrary view, see Cloutier et al., *Droit Administratif*, [1974] R. du B. 244.

⁷⁸ See *Amax Potash Ltd. v. Saskatchewan*, [1977] 2 S.C.R. 576, 71 D.L.R. (3d) 1, especially at 590-91 (S.C.R.), 10-11 (D.L.R.) *per* Dickson J. Also see Hogg, *supra* note 63, at 720.

III. THE SUPERVISORY JURISDICTION OF THE FEDERAL COURT IN QUEBEC

The adoption of the *Federal Court Act* has meant the loss of the supervisory jurisdiction of the superior courts to the new court. Judicial review being a corollary to the principle of parliamentary sovereignty, the Parliament of Canada was able to take that "inherent" jurisdiction away from the provincial courts, purportedly to provide uniformity in the law relating to the federal government and to insure a speedier and more informed supervisory control.

The Federal Court is, however, a court of restricted jurisdiction.⁷⁹ It has only the powers that devolve upon it expressly by federal statute. In case of doubt or silence, the general rules of interpretation favour the provincial superior courts, as courts of original common law jurisdiction.⁸⁰ That principle of interpretation is to be kept in mind in the discussion that follows.

A. The "Federal" Agencies

Section 2 of the *Federal Court Act* attempts to define the various persons or bodies that are to be supervised by the Court. In order to determine whether a person or board is a "federal" agency, one must use the following test:

- (1) the person or body must act (or purport to act) under a federal statute; and
- (2) be created (or pretend to be) by a federal statute or be a *persona designata* under a federal statute.

The first condition has not presented serious difficulties. It means, in practice, that a federal body granted additional jurisdiction by a provincial statute is supervised, while acting in that capacity, by a provincial superior court.⁸¹ The second condition has had some awkward consequences. The concept of the *persona designata* means that where a statute designates a person or member of a court as the holder of an administrative power (as opposed to a jurisdiction conferred to a board or a court as such), that person becomes a federal agency for the purpose of judicial review, even if there is no control by the federal government over the nomination of such persons or over their actions.⁸² Thus, superior court judges and even Québec police officers have

⁷⁹ It is entirely statutory. See *Union Oil of Canada v. The Queen*, [1976] 1 F.C. 74, 72 D.L.R. (3d) 81 (F.C.A.); and *Puerto Rico v. Hernandez*, [1975] 1 S.C.R. 228, (1973), 41 D.L.R. (3d) 549, 14 C.C.C. (2d) 209, where Pigeon J. stated at 233 (S.C.R.), 553 (D.L.R.), 213 (C.C.C.) that "the Federal Court has jurisdiction only where provided by the Act or by any other federal Act . . ."

⁸⁰ Cf. *Board v. Board*, [1919] A.C. 956, 48 D.L.R. 13 (P.C.), quoted in Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1977) at 116. See *Beauvais v. Delisle*, [1977] 1 F.C. 622 (F.C.T.D.).

⁸¹ *Commission d'appel des pensions v. Matte*, [1974] C.A. 252.

⁸² For a more general discussion of the concept of *persona designata* under section 2(g), see Lemieux and Vallières, *La compétence de la Cour fédérale comme organisme bidivisionnel de contrôle judiciaire* (1976), 17 C. de D. 379 at 385-90.

been deemed to be a "federal board" under section 2.⁸³ There is still some uncertainty as to the status of judges under the *Indian Act*,⁸⁴ and the situation is rather complex in the field of extradition.⁸⁵ This dual system of jurisdiction may result in contradictory judgments from the Federal and Provincial Courts as to the interpretation of section 2.⁸⁶

B. Remedies

Under the *Federal Court Act*, the following steps have to be taken by a claimant. He must first make sure that there is a right of appeal on a question of law, as section 29 requires that this recourse be used instead of, or before, the supervisory remedies.⁸⁷ If there is no such right of appeal, the claimant *must* make an "application to review" under section 28 of the Act⁸⁸ if he meets all the conditions. The Federal Court of Appeal will hear his application, as it has no discretion to refuse to do so.⁸⁹ Privative clauses are also of no avail, especially if they were passed before the adoption of the Act,⁹⁰ since section 28 contains a "notwithstanding any other Act" clause. The Court of Appeal will not be able to grant an interlocutory injunction allowing for a stay of proceedings, and it now appears that the Trial Division cannot grant an injunction for the same purpose.⁹¹

The Court of Appeal is not, however, the true holder of the supervisory jurisdiction, since that jurisdiction was given by section 18 to the Trial Division of the Court. Consequently, the courts have interpreted section 28 rather restrictively, and have defined several conditions for the admissibility of an application to review under that section. First, the decision attacked must be

⁸³ See *Walker v. Gagnon*, [1976] 2 F.C. 155, 30 C.C.C. (2d) 177 (F.C.T.D.). But a provincial Transport Board is not a "federal" agency when it deals with interprovincial transport applications, since it is not designated as such and, therefore, is not a *persona designata*. See *Canadian Pacific Transp. Co. v. Highway Traffic Bd.*, [1976] 5 W.W.R. 541, [1976] C.T.C. 337; and *Re Bicknell Freighters Ltd. and Highway Transport Bd.* (1977), 77 D.L.R. (3d) 417 (Man. C.A.). Also see, for a provincial court, *Lees v. The Queen*, [1974] 1 F.C. 605, 46 D.L.R. (3d) 603 (F.C.T.D.).

⁸⁴ See *A.G. Can. v. Lavell*, [1974] S.C.R. 1349, 38 D.L.R. (3d) 481; *Two-Axe v. Iroquois Band Council*, unreported, December 9, 1977 (Que. S.C.).

⁸⁵ See *Vardy v. Scott*, [1977] 1 S.C.R. 293, 66 D.L.R. (3d) 431, 28 C.C.C. (2d) 164.

⁸⁶ See *Bédard v. Isaac*, [1972] 2 O.R. 391 at 395-96, 25 D.L.R. (3d) 551 at 555-56 *per* Osler J. (H.C.).

⁸⁷ *Cf. Mojica v. MMI*, [1977] 1 F.C. 458 (F.C.A.); and *John Graham and Co. v. CRTC*, [1976] 2 F.C. 82 (F.C.A.).

⁸⁸ If the decision is reviewable under section 28, he need not use his right to an administrative appeal where such a right exists. Instead, he may go directly to the Federal Court of Appeal.

⁸⁹ The situation here is different from that which prevails with prerogative writs, injunctions and declarations at common law.

⁹⁰ *Cf. MNR v. MacDonald*, [1977] 2 F.C. 189, 77 D.T.C. 5124 (F.C.A.); and *MNR v. Caughnawaga Indian Band*, [1977] 2 F.C. 269, [1977] C.T.C. 49 (F.C.A.), for a discussion of the effect of posterior privative clauses.

⁹¹ *Fisher v. The Queen*, [1978] 1 F.C. 300 (F.C.T.D.).

either final or capable of causing irreparable harm to the claimant.⁹² If the decision is purely interlocutory, the only recourse will be by way of prohibition or injunction under section 18.⁹³ Second, the decision must be statutorily submitted to a quasi-judicial process. This second condition is the consequence of recent Superior Court decisions. The Federal Court itself was tempted, at first, to enlarge the scope of section 28 to include situations in which the common law had held that the adjudicator had a "duty to act fairly" even if there was no clear statutory provision requiring that a notice or a hearing be given to the persons involved.⁹⁴ The Supreme Court, however, has held that:

- (1) the mere fact that the rights of the claimant are affected is not enough; there must be a duty to act judicially; and
- (2) that duty is to be found in a statute or a regulation adopted under a statute but not in the common law or even in directives or rules of practice.⁹⁵

These restrictions have helped to revitalize the jurisdiction of the Trial Division under section 18. That section transferred from the provincial courts and gave to the Trial Division exclusive jurisdiction over *mandamus*, *quo warranto*, prohibition, *certiorari*, declaration, and other forms of relief of the same nature. While *mandamus*, prohibition and injunction were granted from the bench, there were doubts as to the true extent of the Trial Division's jurisdiction over declaration and *certiorari*, except as a complement to other remedies, as these were largely superseded by section 28, which had priority over section 18. In its decisions in *Hardayal*,⁹⁶ *Howarth*⁹⁷ and *Martineau*,⁹⁸ the Supreme Court indicated that section 18 would be more appropriate than section 28 in situations where the claimant was arguing that he had to be treated "fairly and impartially" in the absence of a quasi-judicial process in the statute being applied.

The Federal Court has respected the new guidelines and has been more eager to grant declarations against purely administrative decisions. The status of *certiorari* is still in doubt, however.⁹⁹

⁹² See *B.C. Packers Ltd. v. CLRB*, [1973] F.C. 1194 (F.C.A.); *A.G. Can. v. Cylien*, [1973] F.C. 1166 (F.C.A.); and *In re Anti-Dumping Act*, [1974] F.C. 22 (F.C.A.). It must have some normative character and not merely be a recommendation. See *Lingley v. Board of Review*, [1976] 1 F.C. 98, 62 D.L.R. (3d) 187, 25 C.C.C. (2d) 81 (F.C.A.).

⁹³ *B.C. Packers Ltd. v. CLRB*, [1974] 2 F.C. 913, 50 D.L.R. (3d) 602 (F.C.T.D.), *aff'd* [1976] 1 F.C. 375 (F.C.A.).

⁹⁴ See *Lazarov v. Secretary of State*, [1973] F.C. 927, 39 D.L.R. (3d) 738 (F.C.A.); and *Blais v. Basford*, [1972] F.C. 151 (F.C.A.).

⁹⁵ *Martineau v. Matsqui Inst.*, *supra* note 17. But see *Magrath v. The Queen*, [1978] 2 F.C. 232, 38 C.C.C. (2d) 67 (F.C.T.D.). Also see *Inuit Tapirayat of Can. v. Léger*, unreported, November 17, 1978 (F.C.A.).

⁹⁶ *MMI v. Hardayal*, [1978] 1 S.C.R. 470, 75 D.L.R. (3d) 465.

⁹⁷ *Howarth v. National Parole Bd.*, [1976] 1 S.C.R. 453, (1974) 50 D.L.R. (3d) 349, 18 C.C.C. (2d) 385.

⁹⁸ *Supra* note 17.

⁹⁹ In *Matsqui Inst. v. Martineau (No. 2)*, [1978] 2 F.C. 637, 40 C.C.C. (2d) 325 (F.C.A.), a writ of *certiorari* was quashed because the decision was not quasi-judicial.

The writ of *habeas corpus* was left outside the scope of section 18. The Federal Court has indicated that it did not have jurisdiction to grant a writ of *habeas corpus*¹⁰⁰ or a declaration to the same effect.¹⁰¹ Since it was not clearly given to the Federal Court, the jurisdiction to grant that remedy has been held (and rightly so) to be left to the provincial superior courts.¹⁰² However, that exception has created some problems. In at least one instance,¹⁰³ there have been contradictory judgments by the Ontario High Court and the Federal Court as to the interpretation of a federal statute. Moreover, some provincial courts¹⁰⁴ have held that they had jurisdiction to grant a *certiorari* in aid as incidental to a writ of *habeas corpus*, while the Québec Court of Appeal has affirmed that the Federal Court had exclusive jurisdiction in that respect.¹⁰⁵

The Superior Court may have some other residual jurisdiction over the Federal agencies. For instance, the remedies peculiar to Québec, such as the direct action in nullity, are not enumerated under section 18. Are these remedies "relief of the nature contemplated" by section 18?¹⁰⁶

A more certain exception is the declaration of unconstitutionality of a federal statute. It would again be contrary to the basic principle of federalism that the Federal Parliament might unilaterally effect judicial review of its legislation. This rather theoretical argument is reinforced by the restrictive interpretation given to section 101 of the *B.N.A. Act* in the *McNamara Construction* case.¹⁰⁷ In fact, the *B.N.A. Act* itself is not a "law of Canada," and is therefore outside the scope of the Federal Court, unless the constitutional question arises only incidentally.¹⁰⁸

C. *Proposals of the Law Reform Commission*

In its Working Paper No. 18, the Law Reform Commission of Canada has proposed some modifications to judicial review of federal agencies. Some

¹⁰⁰ *Sadique v. MMI*, [1974] F.C. 719, 46 D.L.R. (3d) 131 (F.C.T.D.).

¹⁰¹ *Cavanaugh v. Commissioner of Penitentiaries*, [1974] 1 F.C. 515 (F.C.T.D.); *Johns v. Commissioner of Penitentiaries*, [1974] 1 F.C. 545 (F.C.T.D.).

¹⁰² *In re Augustin et M.M.D.I.*, [1976] C.A. 478.

¹⁰³ *Ex parte Spice* (1975), 23 C.C.C. (2d) 141 (Ont. H.C.).

¹⁰⁴ *Re Virginia and Cohen (No. 2)*, [1974] 1 O.R. (2d) 262, 14 C.C.C. (2d) 174 (H.C.); *Ex parte Marcotte* (1973), 10 C.C.C. (2d) 441 (Ont. H.C.).

¹⁰⁵ *Cotroni v. Gouverneur de la prison de Montréal*, [1974] C.A. 313. Also see *Schirm v. Directeur de l'institution Archambault*, [1977] C.S. 428.

¹⁰⁶ *In Puerto Rico v. Hernandez*, *supra* note 79, at 233 (S.C.R.), 553 (D.L.R.), 213 (C.C.C.), Pigeon J. stated that:

[U]nder the first heading, s. 18 confers to the Trial Division of the Federal Court supervisory jurisdiction over "any federal board, commission or other tribunal". The language used is clearly intended to transfer this jurisdiction entirely from the superior courts of the Provinces to the Federal Court.

¹⁰⁷ *McNamara Construction v. The Queen*, [1977] 2 S.C.R. 654, 75 D.L.R. (3d) 273. Also see *Québec North Shore Paper Co. v. C.P.*, [1977] 2 S.C.R. 1054, 71 D.L.R. (3d) 111. These cases will make the provincial courts less reticent to deal with such declarations. See *Denison Mines Ltd. v. A.G. Can.*, [1973] 1 O.R. 797, 32 D.L.R. (3d) 419 (H.C.).

¹⁰⁸ See *Thorson v. A.G. Can.*, [1975] 1 S.C.R. 138, 43 D.L.R. (3d) 1. Cf. Gibson, *Comment* (1976), 54 Can. B. Rev. 372.

of these propositions are of great importance and should be subjected to scrutiny before being implemented. The proposal of a new "reform" only seven years after the creation of the Federal Court is a questionable endeavour, unless such changes eliminate present problems at a single stroke, which is debatable.

1. Interaction with Provincial Courts¹⁰⁹

The Law Reform Commission has apparently taken for granted that the Federal Court has established its usefulness and should be maintained. The evidence in support of such an assumption seems rather weak, but few people in Québec would appreciate the delays that would result from the placement of the federal administrative law cases back on the currently overburdened rolls of the Superior Court.

However, the Working Paper would hand judicial supervision of extradition proceedings back to the superior courts of criminal jurisdiction, where they should have remained in the first place, since extradition is more a criminal than an administrative law matter.

The Commission's Paper also discusses the curious situation of members of superior courts, whose decisions can be controlled by the Federal Court as *persona designata*, but the Commission does not go so far as to suggest that it is illogical to have a court of restricted jurisdiction supervising decisions from courts of general jurisdiction. The Commission also maintains the concept of *persona designata* so as to include provincial officers, even if such supervisory power over provincially appointed persons appears a bit far-fetched. Finally, the Commission recommends no change whatsoever in the *habeas corpus* remedy, and has no solution to the problems created by the duality of jurisdiction.

2. Court of Appeal and Trial Division Jurisdiction¹¹⁰

The most important proposition of Working Paper No. 18 is to eliminate sections 18 and 28 and create a new remedy—the "application for review" before the Trial Division. As a result, the Court of Appeal would be relieved of much of its present workload, and thereby allowed more time for reflection and, supposedly, for more "enlightened" decisions.

This suggestion reflects the view, shared by a few people, that the Court of Appeal, after a good start, has been so encumbered with review cases that it has no more influence in the development of administrative law. Another criticism concerns the nonuse of subsection (1)(c) of section 28, which allows the Court to set aside a decision "based on an erroneous finding of fact . . . made in a perverse or capricious manner or without regard for the material" The unification of the present remedies would also reduce the difficulties caused by the present bi-divisional system and especially by the phraseology of section 28. However, some of the more detailed propositions of the Commission on this point invite criticism. For instance, is it desirable

¹⁰⁹ Working Paper No. 18, *supra* note 2, at 9-14.

¹¹⁰ *Id.* at 15-23.

to give the Trial Division the power to transfer a case to the Appeal Court? Is it practical to set up a specialized administrative law subdivision of the Trial Division? The suppression of appeals on questions of law and the discretion left to the Appeal Court as to appeals from the Trial Division are not necessarily beneficial, and no strong arguments have been advanced to support these changes. Other minor suggestions, such as transferring the immigration cases to the Trial Division and stopping the use of Federal Court judges as Unemployment Insurance umpires, do not change the bi-divisional character of the Court, but are welcome nevertheless.

3. Grounds and Procedure for Review¹¹¹

The proposed procedure for review would repeal all existing remedies, including appeals on questions of law, and create a single application for review. Probably inspired by the enumeration of grounds for review found in section 28(1), the Commission proposes its own list that, fortunately, is not limitative. It includes a new ground—unreasonable delay in reaching a decision—that does not appear to be based on the common law. It also includes “no evidence,” which the Québec Court of Appeal does not recognize as affecting jurisdiction and therefore will not use to review a decision wherever there is a privative clause.¹¹² The Working Paper would thus abolish the list of remedies as found in section 18, and draw instead an enumeration of all forms of relief that can be granted under the proposed application for review.

While eliminating some difficulties caused by the common law remedies as well as section 28, this method may have a drawback—the possibility of resurrecting the jurisdiction of the superior courts as an alternative forum for judicial review. As we have seen, the jurisdiction of the Federal Court is to be interpreted restrictively. Any supervisory power that is not vested exclusively in the Court remains with the provincial courts. The enumeration of remedies under section 18 has effectively ousted the jurisdiction of the superior courts. It is not clear, however, whether the mere enumeration of available forms of relief will be enough to convince the provincial courts that the *status quo ante* has not been changed.

One additional point may be made as to the enumeration itself. At least one form of relief—that granted by *quo warranto*—is not included in the proposed list. Thus, the effect of implementing this proposition would be to give back to the provincial courts their former jurisdiction over *quo warranto* proceedings.

4. Administrative Action Subject to Judicial Review¹¹³

The Commission's Working Paper reflects a very cautious attitude towards some persons and bodies who have a privileged status under the present *Federal Court Act*.

¹¹¹ *Id.* at 25-31.

¹¹² *Lefebvre v. Ledoux*, [1973] C.A. 645.

¹¹³ Working Paper No. 18, *supra* note 2, at 33-38.

The Crown is not mentioned in section 2; consequently, proceedings against the Crown have to be instituted under section 17, and then, only declaratory relief may be granted.¹¹⁴ This may be the appropriate time to do away with the total immunity of the Federal Crown in relation to prerogative writs and injunctions, and to make it subject to the same law as everyone else. The parallel regime set by section 17 is no longer justified by the constitutional situation of the Crown.

The same cautious attitude was shown towards the Cabinet. The Commission agrees that the Cabinet may be subject to a declaration under section 18, notwithstanding the fact that section 28 expressly excludes the Cabinet. The Commission suggests that there should be an application for review of a Cabinet decision, but only on "strict questions of legality, not fairness." This approach is rather curious, coming from a "reform" commission, as it attempts to turn back the clock as to judicial review. In fact, the Federal Court has already accepted that the Cabinet is under the rule of law¹¹⁵ and, in at least one case,¹¹⁶ has shown that it could examine whether the Cabinet had used a proper procedure in revoking the pardon of a Québec union official.

There is no recommendation regarding the other exceptions set by section 28(6)—the Treasury Board, a superior court, the Pension Appeals Board, courts martial. The Commission's only suggestion is that a study be made as to the desirability of retaining these exceptions, a task that one would presume to be well within the Commission's jurisdiction.

Finally, the Commission does suggest that natural justice should apply to every type of administrative decision. This proposal seems rather revolutionary for Canada, but would be in line with the judgment of the House of Lords in *Ridge v. Baldwin*.¹¹⁷ However, a catch-22 is set by the last words of the proposal: "unless the public interest that decisions conform with natural justice is outweighed by another public interest, such as efficiency in government, national security, confidentiality, etc. . . ." It is difficult to evaluate whether such a formula represents a step forward or backward!

Before any of the Working Paper's recommendations are adopted, it might be a valuable exercise to reevaluate the need for the Federal Court as an additional supervisory body. There should also be a reevaluation of the case

¹¹⁴ See *MNR v. Creative Shoes*, [1972] F.C. 933, 73 D.T.C. 5127 (F.C.A.). But the Crown may be a party to proceedings under section 18 as the representative of a person, or group of persons who do not have legal status to appear as a party. Cf. *Landreville v. The Queen*, [1973] F.C. 1223, 41 D.L.R. 574 (F.C.T.D.); and *Smith v. The Queen*, [1972] F.C. 561, 28 D.L.R. (3d) 93 (F.C.T.D.).

¹¹⁵ *Desjardins v. Bouchard*, [1976] 2 F.C. 539, 71 D.L.R. (3d) 491, 31 C.C.C. (2d) 506 (F.C.T.D.); *Inuit Tapirsat v. Léger* (1978), 87 D.L.R. (3d) 26 (F.C.T.D.). The Federal Court of Appeal has since reversed the decision of the Trial Division in the *Inuit Tapirsat* case, and has decided that the Governor-in-Council had a duty to act fairly when hearing appeals from the CRTC. See note 95, *supra*.

¹¹⁶ *Desjardins v. Bouchard*, *id.*

¹¹⁷ [1964] A.C. 40, [1963] 2 All E.R. 66 (H.L.). The Supreme Court of Canada has recently followed this decision in *Nicholson v. Haldimand-Norfolk Regional Bd. of Comm'rs of Police* (1978), 23 N.R. 410.

law concerning the sharing of jurisdiction between the Appeal and Trial divisions of the Court. Nevertheless, some difficult questions that existed when the Commission undertook its study of the Federal Court may now have been clarified by the courts.

IV. CONCLUSION

This "tableau en raccourci" of the law of remedies against public authorities in Québec does not pretend to deal with every facet of this area of the law. Its only purpose is to place in perspective the myriad of remedies currently in use, and the constitutional framework behind it. The situation will certainly evolve towards a simplification of the present law. It is to be hoped that the courts will no longer have to put so much emphasis on the niceties of procedural questions, but rather, will deal with the real problems affecting the parties involved.